

The Long Arm of the EU GDPR: What it Means for Malaysian Companies



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When the European Union (EU) General Data Protection Regulation (GDPR) came into force in 2018, one of its most eye-catching features was its extraterritorial jurisdiction provisions. With these provisions, controllers (similar to data users under our Personal Data Protection Act 2010) and processors located outside of the EU may still be subject to the EU GDPR, including controllers and processors located in Malaysia.

The territorial scope of the EU GDPR is set out in Art 3 of the EU GDPR, which is defined on the basis of the following two main criteria:



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1. The establishment criterion as per Art 3(1)

Where the non-EU controller or processor established outside of the EU exercises “a real and effective activity” through “stable arrangements” in the EU, this non-EU controller or processor can be considered to have an establishment in the EU. The processing of personal data that is carried out by the non-EU controller or processor “in the context of the activities of” such establishment in the EU may render the EU GDPR applicable to them.

It is important to note that the legal form of such “stable arrangements”, whether through a branch or a subsidiary with a legal personality, is not the determining factor on whether there is in fact any “stable arrangements” in the EU.¹



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2. The targeting criterion as per Art 3(2)

In the absence of an establishment in the EU, a controller or processor established outside of the EU may still be subject to the EU GDPR if its data processing activities relate to:

- (a) the offering of goods and services directed at data subjects in the EU; or
- (b) the monitoring of data subjects’ behaviour takes place in the EU.



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On the one hand, in determining whether a non-EU controller or processor is offering goods or services to data subjects in the EU, there is a need to ascertain if it is apparent that the non-EU controller or processor envisages offering of goods or services to data subjects in the EU.² In

¹ Recital 21, EU GDPR
² Recital 23, EU GDPR

this regard, mere accessibility of the non-EU controller or processor's website in the EU is insufficient to ascertain such intention and other factors would need to be available to indicate an intention to offer goods or services to data subjects in the EU. On the other hand, in determining whether a processing activity can be considered to monitor the behaviour of data subjects, there is a need to ascertain whether data subjects are tracked on the internet, including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.³

Three years since the EU GDPR came into force, data protection regulators in the EU are ramping up enforcement actions against companies that violate the EU GDPR, including non-EU companies. Recently, fines were imposed on a company with no establishment in the EU. A fine of €525,000 (approx. RM2.6 million) was imposed by the Dutch Data Protection Authority (Autoriteit Persoonsgegevens, or **AP**), on Locatefamily.com, for its failure to appoint a representative in the EU, which is a requirement applicable to controllers or processors who fall within the scope of Art 3(2) of the EU GDPR. The AP also ordered the company to remedy this shortcoming, failing which it would impose an additional penalty of €20,000 (approx. RM100,000) for every two weeks of non-compliance (up to a maximum of €120,000 (approx. RM590,000)).⁴

As a brief background, Locatefamily.com is a platform where people can search for the contact information of family members and friends with whom they have lost contact or of other people they would like to get in touch with. It provides the personal details of people around the world, including in the EU, such as their names, addresses and phone numbers. Approximately 700,000 Dutch people are listed on the site. A technical investigation conducted by the AP found that Locatefamily.com is hosted by a Canadian webhost, and therefore likely to be a Canadian company, although the AP was unable to find any concrete indications of the location of establishment of Locatefamily.com. The AP concluded that Locatefamily.com falls within the scope of Art 3(2) of the EU GDPR for offering its services to data subjects in the Netherlands and several other EU countries, despite not having any establishment in the EU. Thus, Locatefamily.com has to comply with the EU GDPR, including appointing a representative to be based in the EU. As Locatefamily.com failed to appoint an EU representative, a fine was imposed.

³ Recital 24, EU GDPR

⁴ See press release on "Dutch DPA imposes fine of €525,000 on Locatefamily.com":
<https://autoriteitpersoonsgegevens.nl/en/news/dutch-dpa-imposes-fine-%E2%82%AC525000-locatefamilycom>

This case shows that a non-EU company with a website hosted outside of the EU region but accessible to anyone in the world, including those in the EU, may still be subject to the EU GDPR. It is important to note that whether Art 3 of the EU GDPR is triggered in a particular situation requires considerable assessment, and it depends very much on the individual case, e.g. whether the facts and evidence are clear that the non-EU company intended to offer its goods and services to data subjects in the EU.

Conclusion

With data protection regulators not hesitating to take action against non-EU companies, it is high time that companies in Malaysia, in particular those with customers or business dealings in the EU, conduct appropriate assessment to identify if they fall within the scope of the EU GDPR. In so doing, the company may consider the following factors: whether it has any establishment in the EU, whether its website can be seen as directing or marketing its goods or services to data subjects in the EU, whether the activity is international in nature, whether there is any offering of delivery services in the EU in respect of the goods and others.

As hefty fines may be imposed for failing to comply with the EU GDPR — up to €20 million (approx. RM99 million) or 4% of annual global turnover (whichever is higher) — Malaysian companies should no longer adopt a passive wait and see approach.

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